FEATURES ESSAY

On the Legality of Prosecuting State-Owned Enterprises: *Halkbank v. United States*

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In *Halkbank v. United States*, the Supreme Court held that the Foreign Sovereign Immunities Act (FSIA), the statutory framework governing foreign sovereign immunity under U.S. law, does not apply to criminal cases. This means that, in the Court's view, the FSIA's grant of immunity also does not extend to criminal prosecutions of state instrumentalities. We argue that by contrast, under international law, states are absolutely immune from the criminal jurisdiction of other states, and that this immunity should extend on a case-by-case basis to state instrumentalities like state-owned enterprises. The United States's divergence from international law and the practice of other states is likely to become more controversial as U.S. courts become involved in prosecutions of state-owned enterprises in politically contentious settings. These risks are particularly heightened in the enforcement of secondary sanctions, a regime that is already under scrutiny by the international community.

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INTRODUCTION

In October 2019, the United States indicted Türkiye Halk Bankası A.Ş. (Halkbank), Turkey's second-largest state-owned bank. The prosecution alleged that Halkbank facilitated a multiyear scheme to launder about $20 billion of Iranian oil and gas proceeds, in violation of the United States's expansive and increasingly controversial sanctions regime against Iran.[1] Halkbank filed a motion to dismiss the indictment and argued that it is immune from criminal prosecution as an "instrumentality of a foreign state" under the Foreign Sovereign Immunity Act of 1976 (FSIA). The bank's interlocutory appeal progressed through the federal judiciary, culminating in a Supreme Court ruling in April 2023.[2] In the majority decision, the Court rejected Halkbank's immunity defense, asserting that the FSIA applies only to civil, and not criminal, cases. The Court remanded the case to the lower court to further assess the bank's potential eligibility for immunity under common law.[3]

The Halkbank case is significant not only for the scale of the underlying sanctions-evasion scheme—estimated to be the "largest in modern history"—but also for the legal issues it raises.[4] Key among them is the scope and limits of U.S. *criminal* jurisdiction over a sovereign instrumentality, in this instance, a state-owned bank.[5] So far, such cases have been so rare as to merit singular attention.[6] But they may suggest a new inclination of the United States to use criminal prosecutions to further foreign policy objectives.[7] Without meaningful safeguards, this practice risks exacerbating geopolitical tensions in an increasingly contested world order.

Against this high-stakes backdrop, we consider where international law stands regarding the prosecution of state-owned entities, with a focus on the

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1. Max Boot, *Washington Is Sanctioning 12,000 Entities. It's Backfiring.*, WASH. POST (June 5, 2023, 6:15 AM EDT), https://www.washingtonpost.com/opinions/2023/06/05/sanctions-treasury-backfiring-china-russia [https://perma.cc/6ZH6-F7C6]; United States v. Turkiye Halk Bankasi A.S., No. 1:15-cr-00867-RMB, 2020 WL 1125399 (S.D.N.Y. Jan. 21, 2020) (Trial Pleading).

2. United States v. Halkbank, No. 15 CR. 867 (RMB), 2020 WL 5849512, at *4 (S.D.N.Y. Oct. 1, 2020), *aff'd sub nom.*, 16 F.4th 336 (2d Cir. 2021), *aff'd in part, vacated in part, remanded*, 598 U.S. 264 (2023).

3. Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264 (2023).

4. Michael B. Kelley, *Turkish-Iranian Gold Trader's 'Beautiful Mind' Testimony Drove U.S. Sanctions Case*, YAHOO FIN. (Jan. 28, 2018), https://finance.yahoo.com/news/gas-gold-turkey-iran-scheme-explained-151517687.html [https://perma.cc/PJ6M-9CUA].

5. *See* Megan Q. Liu, *The Scope of Sovereign Criminal Immunity: Instrumentalities Under the Foreign Sovereign Immunities Act*, 60 COLUM. J. TRANSNAT'L L. 276, 279 (2021).

6. For a non-exhaustive list of cases concerning criminal jurisdiction over state instrumentalities pre-*Halkbank*, see John Balzano, *Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate*, 38 N.C. J. INT'L L. 43, 53-60 (2012). For two prominent recent cases, see United States v. Pangang Grp. Co., Ltd., 6 F.4th 946 (9th Cir. 2021); and *In re* Grand Jury Subpoena, 749 F. App'x 1 (D.C. Cir. 2018).

7. *See generally* Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340 (2019) (coining the term "foreign affairs prosecutions" to refer to prosecutions that implicate other nations' criminal justice interests and the United States's foreign policy interests); Ingrid (Wuerth) Brunk, *The Mystery Grand Jury Case and Criminal Prosecutions of State-Owned Enterprises*, LAWFARE (Dec. 21, 2018, 11:26 AM), https://www.lawfaremedia.org/article/mystery-grand-jury-case-and-criminal-prosecutions-state-owned-enterprises [https://perma.cc/7CGT-KMFP] (noting the "unmistakable trend toward the criminal prosecution of foreign organizations with ties to foreign governments").

doctrine of sovereign immunity. Much of the existing literature has so far concentrated on the history and scope of the FSIA and its interplay with other federal statutes.[8] However, this commentary has largely neglected that state immunity is also a question of international law, not just of U.S. statutory and common law.[9] Furthermore, international law offers a much-needed source of guidance in light of the uncertainty created by the *Halkbank* decision. The Supreme Court's decision makes clear that immunity determinations in the criminal context will no longer be governed by the FSIA and its existing case law, leaving open a gap that lower courts will have to fill.

In search of such guidance, we reconstruct existing principles of customary international law along two distinctions: between civil litigation and criminal prosecution, and between status-based and conduct-based immunities. Starting with the premise that states are absolutely immune from criminal prosecution, we argue that state instrumentalities should also be immune from criminal prosecution depending on the particular conduct being prosecuted. Specifically, state instrumentalities should be immune when they engage in sovereign conduct.[10]

However, the approach likely to be adopted by the Second Circuit on remand, as signaled in both its initial decision and recent oral arguments, significantly diverges from our own. It not only excludes any consideration of international law but also gestures toward a posture of complete deference to the executive branch in immunity determinations.[11] As commentators have already noted, this is a recipe for highly politicized adjudicative processes—precisely the risks that led to the FSIA's adoption in 1976.[12] We extend these concerns already expressed by others to argue that, for prudential reasons, the United States has an interest in keeping immunity determinations within the judiciary, and granting immunity in line with international law and general state practice. This becomes even more crucial as the United States enters into the uncertain terrain of giving criminal effect to its secondary sanctions regime, a form of economic statecraft whose legitimacy is under question by the international community.

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8. *See, e.g.*, Brief of Professors Ingrid (Wuerth) Brunk and William S. Dodge as *Amici Curiae* in Support of Neither Party, Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264 (2023) (No. 21-1450); Ingrid (Wuerth) Brunk & William S. Dodge, *Executive Control Versus "Deference" in Halkbank*, TRANSNAT'L LITIG. BLOG (Jan. 18, 2023), https://tlblog.org/executive-control-versus-deference-in-halkbank [https://perma.cc/UNV9-274R]; Leading Case, *Turkiye Halk Bankasi A.S. v. United States*, 137 HARV. L. REV. 420, 426 (2023).

9. In U.S. law, this concept is usually referred to as "foreign sovereign immunity," whereas in international law it is referred to as "state immunity." We use the former term when referring to U.S. law, and prefer the latter term in discussions of international law.

10. *See also infra* Part II.

11. *See* United States v. Turkiye Halk Bankasi A.S., 16 F.4th 336, 351 (2d Cir. 2021) ("[A]t common law, sovereign immunity determinations were the prerogative of the Executive Branch; thus, the decision to bring criminal charges would have necessarily manifested the Executive Branch's view that no sovereign immunity existed.").

12. See references in *supra* note 8.

I. THE *HALKBANK* CASE

A. Factual Background

The intricate *Halkbank* saga stretches back well before the bank's formal indictment in 2019, revealing years of drama involving various administrations, actors, front companies, and fake invoices.[13] At the heart of the case is a multi-billion-dollar scheme to release Iranian oil and gas proceeds in violation of the restrictions imposed by the U.S. sanctions regime, dating back to at least 2012.[14] Halkbank stands accused of knowingly facilitating this scheme as the exclusive entity designated by Turkey for holding oil and gas proceeds owed to Iran. The indictment identifies two primary methods in which Turkish officials conspired to breach U.S. sanctions restrictions on Iranian access to its accounts in Turkey. The first was what came to be known as the "golden loophole," which enabled gold purchases using the funds held in the Iranian account.[15] The second was fraudulent transactions disguised as food and medicine purchases by Iranian customers to exploit the so-called "humanitarian exception."[16] These transactions, as detailed in the indictment, were carried out by a vast network of Turkish and Iranian political officials, including ministers and high-level civil servants. Some of these officials allegedly received millions of dollars from the proceeds.[17] The currency acquired through the scheme is thought to have accounted for up to "two-thirds of Iran's total foreign exchange holdings at the time."[18]

The present proceedings against Halkbank stem from the arrest and indictment of Reza Zarrab, a businessman and key figure in the conspiracy, in 2016. Apprehended on a family trip to Disney World, Zarrab ultimately pled guilty and cooperated with the Department of Justice. His testimony became a key piece of evidence, detailing the scheme and implicating President Erdoğan at several junctures of the scheme.[19] Zarrab most notably alleged that when the volume of money flowing through Halkbank became overwhelming, Erdoğan personally approved the involvement of two additional Turkish state-owned banks.[20] A memorandum by Preet Bharara, the then-U.S. Attorney for the Southern District of New York (S.D.N.Y.), corroborated Mr. Zarrab's claims about the network's close ties to and dependence on Erdoğan, who had also

13. Jonathan Schanzer, *The Biggest Sanctions-Evasion Scheme in Recent History*, THE ATL. (Jan. 4, 2018), https://www.theatlantic.com/international/archive/2018/01/iran-turkey-gold-sanctions-nuclear-zarrab-atilla/549665 [https://perma.cc/K46C-WKA5].

14. Kelley, *supra* note 4.

15. *Id.*

16. Office of Public Affairs, *Turkish Bank Charged in Manhattan Federal Court for Its Participation in a Multibillion-Dollar Iranian Sanctions Evasion Scheme*, U.S. DEP'T OF JUST. (Oct. 15, 2019), https://www.justice.gov/opa/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar-iranian [https://perma.cc/Q5T9-FJW3].

17. *Id.*

18. *Id*.

19. Jose Pagliery, *Turkey's Erdogan Helped Iran Evade US Sanctions, Witness Claims*, CNN (Dec. 1, 2017), https://www.cnn.com/2017/11/30/middleeast/reza-zarrab-us-trial-erdogan/index.html [https://perma.cc/L7GT-X6DR].

20. *Id.*

allegedly attempted to protect Zarrab from prosecution in Turkey.[21]

Bharara's decision to prosecute Halkbank caused a rift between high-profile political actors in the United States.[22] Erdoğan repeatedly attempted to convince then-Vice President Joe Biden to remove Bharara and to stop the prosecution, though Biden refused.[23] Erdoğan had better luck when President Trump entered the White House. In early 2017, Trump fired Bharara, and also tried to enlist then-Secretary of State Rex Tillerson in getting the Justice Department to drop the criminal case against Zarrab.[24] After Bharara's dismissal, Trump's White House did not relent in attempting to sway the Halkbank investigation, now overseen by Geoffrey Berman.[25] After William Barr's early 2019 confirmation as Attorney General, the administration's stance did not change; S.D.N.Y. remained subject to political pressures from higher-ups for dismissal of the case.[26] Even though Berman obtained the Justice Department's permission to separately indict Halkbank, he was soon after dismissed by William Barr.[27]

Across the Atlantic, the gold-for-oil scheme was first revealed in December 2013 during a broad-based corruption investigation by Turkish prosecutors.[28] The probe implicated senior members of Erdoğan's ruling Justice and Development Party, including four of his cabinet ministers and even his son.[29] Police raids uncovered a substantial amount of money, including $4.5 million hidden in shoe boxes at Halkbank's then-general manager's house.[30] In response, Erdoğan purged thousands of implicated police officers,

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21. Government's Memorandum of Law in Opposition to Defendant Reza Zarrab's Motion for Bail at 14, United States v. Reza Zarrab, No. S1 15 Cr. 867 (RMB), 2016 WL 10649272 (S.D.N.Y. May 25, 2016).

22. Ryan Goodman & Danielle Schulkin, *Timeline: Trump, Barr, and the Halkbank Case on Iran Sanctions-Busting*, JUST SEC. (Jul. 27, 2020), https://www.justsecurity.org/71694/trump-barr-and-the-halkbank-case-timeline [https://perma.cc/ZQN6-DBZK].

23. *Id.*

24. *Id.*

25. Eric Lipton & Alan Rappeport, *Bolton Book Puts New Focus on Trump's Actions in Turkey and China Cases*, N.Y. TIMES (Jan. 28. 2020), https://www.nytimes.com/2020/01/28/us/politics/bolton-book-trump-china-turkey.html [https://perma.cc/3U97-3KW7].

26. *Id*.

27. *Id.*

28. *See, e.g.*, Mustafa Akyol, *What You Should Know About Turkey's AKP-Gulen Conflict*, AL-MONITOR (Jan. 3, 2014), https://www.al-monitor.com/originals/2014/01/akp-gulen-conflict-guide.html#ixzz8QnRGoUNp [https://perma.cc/28BY-CHGU] (highlighting the Gülenist ties of Zekeriya Öz, the chief prosecutor leading the investigation and situating the investigation in its broader context); Ece Toksabay, *Turkish Corruption Prosecutors Flee After Arrest Warrants Issued*, REUTERS (Aug. 11, 2015, 10:33 AM EDT), https://www.reuters.com/article/idUSKCN0QG1KU [https://perma.cc/2TZ4-L824] (providing information about the prosecutor's fleeing to Germany after their dismissal and the issuance of arrest warrants); Berivan Orucoglu, *Why Turkey's Mother of All Corruption Scandals Refuses to Go Away*, FOREIGN POL'Y (Jan. 6, 2015, 5:25 PM), https://foreignpolicy.com/2015/01/06/why-turkeys-mother-of-all-corruption-scandals-refuses-to-go-away [https://perma.cc/DZ8W-V27Y] (providing an overview of the power struggle leading to the corruption investigation and its forced dismissals after Erdoğan's victory in local elections).

29. Basak Özay, *Government in Crisis*, DEUTSCHE WELLE (Dec. 26, 2013), https://www.dw.com/en/turkey-rocked-by-corruption-scandal/a-17324458 [https://perma.cc/WCH3-RDTK].

30. Andrew Finkel, *The Filth in Erdogan's Closet*, N.Y. TIMES (Dec. 27, 2013), https://www.nytimes.com/2013/12/28/opinion/the-filth-in-erdogans-closet.html [https://perma.cc/6X87-

prosecutors, and judges, resulting in the forced closure of cases and even returning of the confiscated money in shoe boxes with interest.[31]

B. Procedural History

In 2019, after much interbranch strife and years of lobbying wars, a S.D.N.Y. grand jury charged Halkbank on several counts including conspiracy to violate the International Emergency Economic Powers Act (IEEPA), bank fraud, and money laundering.[32] In turn, Halkbank filed a motion to dismiss, arguing that under the FSIA, it was an instrumentality of a foreign state entitled to immunity.[33]

The FSIA, passed by Congress in 1976, is the U.S. statutory framework governing foreign sovereign immunity law.[34] Shifting away from an era in which the executive made determinations of foreign sovereign immunity on a case-by-case basis, the FSIA codified the principle that the federal judges would decide instead.[35] The FSIA was intended to uphold the principle of the separation of powers and limit the risks of inconsistent and politicized adjudication by the executive.[36] The FSIA states that "a foreign state shall be immune from the jurisdiction of the courts of the United States," except in the listed exceptions under Sections 1605-1607. A "foreign state" is defined by the statute as including "an agency or instrumentality of a foreign state."[37] While the FSIA does not specify whether immunity applies to civil or criminal cases, the statute goes on to confer subject matter jurisdiction for any *civil* actions that fall within the list of exceptions—including, most notably, the "commercial activity exception."[38]

The district court, on Halkbank's motion to dismiss, interpreted the FSIA's silence on jurisdiction over criminal cases to mean that the statute's *grant of immunity* did not extend to criminal proceedings.[39] The district court further rejected Halkbank's argument that Halkbank was entitled to immunity under the common law,[40] and exercised jurisdiction over Halkbank based on a separate statute granting criminal jurisdiction, 18 U.S.C. § 3231.[41]

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31. *Id.*

32. United States v. Halkbank, No. 15 CR. 867 (RMB), 2020 WL 5849512, at *1 (S.D.N.Y. Oct. 1, 2020).

33. *Id*. at *4.

34. 28 U.S.C. §§ 1602-1611 (2018).

35. The House Committee Report identifies other objectives that drove the enactment of the Act: to codify the restrictive view of immunity, to establish a statutory mechanism for service of process, and to restrict foreign governments' entitlement to absolute immunity from attachment. *See* H.R. REP. NO. 94-1487, at 9-10 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06.

36. Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981).

37. 28 U.S.C. § 1603(a).

38. 28 U.S.C. § 1604-1606.

39. United States v. Halkbank, No. 15 CR. 867 (RMB), 2020 WL 5849512, at *4 (S.D.N.Y. Oct. 1, 2020).

40. *Id*. at *6.

41. The court held that 18 U.S.C. § 3231 gave federal district courts personal jurisdiction over "any defendant brought before it on a federal indictment charging a violation of federal law." *Id*. at *7.

On Halkbank's interlocutory appeal, the Second Circuit affirmed the lower court's decision. The circuit court did not decide on whether the FSIA granted immunity to foreign sovereigns in criminal cases, but nonetheless found that the district court had jurisdiction. It rejected Halkbank's argument that the FSIA is the only possible way for a federal court to exercise jurisdiction over a foreign state or its instrumentality, and upheld the district court's finding of personal jurisdiction.[42] Finally, like the district court, the Second Circuit found that even if the FSIA did apply, Halkbank would still be denied immunity under the commercial activity exception.[43]

In a majority decision written by Justice Kavanaugh, the Supreme Court upheld the Second Circuit's holding in part and vacated and remanded in part. The Court held that the FSIA only covered civil suits, and "[did] not provide foreign states and their instrumentalities with immunity from *criminal* proceedings."[44] The Court reasoned based on the text of the statute—including the fact that while the statute contained many provisions concerning civil actions, it was "silent as to criminal matters."[45] The Court considered the silence of the FSIA on criminal matters to be important, as it reasoned that if Congress had intended to immunize foreign states and their instrumentalities from criminal prosecution, that intention would be clear on the face of the statutory text. To grant immunity from criminal prosecution without explicitly stating so would be like "hid[ing] elephants in mouseholes."[46] In the absence of an explicit grant of immunity, 18 U.S.C. § 3231's expansive grant of jurisdiction applied. The Court, however, recognized that Halkbank may have a claim for immunity under the common law and remanded to the Second Circuit for further consideration.[47]

Most existing commentary has tended to rely on analysis of the U.S. statutory and common law regime governing foreign sovereign immunity,[48] but this trend neglects the fact that the immunity of sovereign states in other states' courts is also a matter of international law.[49] Indeed, it is precisely in cases

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According to 18 U.S.C. § 3231, "[t]he district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

42. United States v. Turkiye Halk Bankasi A.S., 16 F.4th 336, 347 (2d Cir. 2021).

43. *Id*.

44. Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264, 271 (2023).

45. *Id*. at 274.

46. *Id*.

47. *Id*. at 281.

48. *See supra* note 8. *But see* Brief of Mark B. Feldman, Esq. and Professor Chimène Keitner as *Amicus Curiae* in Support of Respondent at 5-16, Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264 (2023) (No. 21-1450) (discussing reasons why Halkbank is not entitled to immunity under international law); Brief of Professor Roger O'Keefe as *Amicus Curiae* in Support of Petitioner, Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264 (2023) (No. 21-1450) (discussing reasons why Halkbank is entitled to immunity under international law).

49. While state immunity is a principle of customary international law, it is primarily governed by the domestic legislation of states. *See* XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 1, 6 (2012) (noting that "State immunity is a principle of customary international law" and that "'[t]he current law of State immunity has developed predominantly as a result of cases decided by national courts in legal proceedings against foreign States"). The Restatement (Fourth) of the Foreign Relations Law of the United States states that the FSIA "codifies and applies international law as the United States views it." We use the term "customary international law" henceforth because there

such as *Halkbank*, involving politicized inter-state conflicts, that customary international law is most applicable and necessary.

II. TWO DISTINCTIONS IN THE CUSTOMARY INTERNATIONAL LAW OF STATE IMMUNITY

In this Part, we examine the current state of customary international law on sovereign immunity as it applies to the *Halkbank* case. Our analysis hinges on two key distinctions: the exercise of civil versus criminal jurisdiction, and the immunity granted based on status versus conduct. Through these two layers of analysis, we suggest that state immunity in criminal cases is absolute, and that this immunity should extend to state instrumentalities, including state-owned enterprises when they engage in sovereign, non-commercial conduct.

State immunity in international law follows from the principle of sovereign equality, which is "one of the fundamental principles of the international legal order."[50] The baseline principle of sovereign equality corresponds to a general presumption of state immunity under customary international law.[51] From this baseline, international law recognizes a limited number of exceptions in which states do *not* enjoy immunity for their acts.[52] This is an approach that is called the *restrictive* theory of sovereign immunity, in contrast to the formerly dominant theory of absolute immunity.[53]

In practice, the limited and enumerated exceptions to state immunity generally apply to states' so-called "private" or commercial acts (*acta jure gestionis*), such as entering into a contract, in contradistinction to their "public" or uniquely sovereign acts (*acta jure imperii*), such as waging war.[54] While this

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are few treaty sources to speak of.

50. Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening), Judgment, 2012 I.C.J. 99, ¶ 57 (Feb. 3) [hereinafter Germany v. Italy].

51. G.A. Res. 59/38 (Dec. 2, 2004) (listing the exceptions to immunity, suggesting that exceptions to immunity must be specifically enumerated); Germany v. Italy, *supra* note 50, ¶ 56 (recognizing state immunity as a principle of customary international law, citing the International Law Commission and noting that this conclusion is "confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States [on the UNCSI]"). *But see* Chimène Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 233 (2021) (suggesting that jurisdiction is the normal rule and immunity is the exception, rather than the other way around).

52. The proper scope of state immunity remains a subject of robust controversy, especially as new exceptions to this doctrine are being proposed. This debate, however, should be clearly distinguished from two related but ultimately distinct trends in international law. The first is the expanding reach of national laws to address a range of serious offenses, driven by a commitment to combat global impunity and to enhance cooperation in extraditions and prosecutions. While this shift broadens the grounds for cross-border criminal actions, it does not, by itself, nullify the immunity that states or their officials may possess in these contexts. The second trend, which also falls outside the scope of this Essay, is the immunity of states and their officials before international tribunals, where the absence of immunity is ultimately grounded in state consent. These developments are therefore conceptually and doctrinally separate from the central focus of this article: the extent to which one state can prosecute another or another state's instrumentality in its domestic courts.

53. *See* Argentina v. Weltover, 504 U.S. 607, 607 (1992) (drawing a distinction between a state acting as regulator of a market and participant within that market); HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 32 (3d ed. 2015).

54. Germany v. Italy, *supra* note 50, ¶ 59 (noting that many states distinguish between *acta jure gestionis*, which gives rise to the limited set of immunity claims that are available to states, and *acta jure imperii*, and that this distinction is also reflected in interstate treaties); Philippa Webb, *How Far Does the Systemic Approach to Immunities Take Us?*, 112 AJIL UNBOUND 16, 16 (2018) (noting that

distinction is far from clear-cut, there are some acts that are less controversially deemed to be exercises of sovereign power—for example, the exercise of its police power and, perhaps the least controversial example of all, the use of armed force in the waging of war.[55] It is unclear, however, how a criminal prosecution against the instrumentality of a foreign state, which is at least in part engaged in commercial activity, would fit into this framework.

A. Immunity in Civil Versus Criminal Proceedings

Some leading experts in state immunity law have argued that, under customary international law, sovereigns enjoy absolute immunity in criminal cases.[56] They argue that even though international law has seen a shift in civil cases towards the restrictive doctrine of state immunity, such a shift has not been observed in criminal cases.[57] But why is this the case?

One easy answer to this question is that state practice does not support criminal jurisdiction over sovereign states. Customary international law is the product of state practice and *opinio juris*, and current state practice reflects the position that states are absolutely immune from criminal prosecution.[58] As Azerbaijan and Pakistan's amicus brief in *Halkbank* noted, the United States would be the first to "tak[e] the drastic step of breaching an international law consensus and subjecting other sovereigns to criminal prosecution."[59] Several countries, including Canada, Singapore, and South Africa, have enacted legislation barring the extension of criminal jurisdiction over other states.[60] Indeed, the United States has even seemingly agreed with this view in previous litigation, stating that "criminal proceedings [are] 'categorically different' for immunity purposes" because international law "does not recognize the concept of state criminal responsibility."[61]

Building on this existing state practice, we seek to put the position that states are absolutely immune from criminal jurisdiction on firmer ground through a rational reconstruction of the existing principles of customary international law. This reconstruction enables us to show why such an interpretation of state immunity is internally consistent with other principles of

various forms of immunity "*all* derive from the principle of sovereign equality and apply by reference to some kind of division between acts of a private and public nature" (emphasis added)).

55. Sangeeta Shah, *Jurisdictional Immunities of the State:* Germany v. Italy, 12 HUM. RTS. L. REV. 555, 559 (2012) (noting that "[i]t is beyond doubt that the use of armed force is intrinsically governmental and, therefore, acts committed during the course of armed conflict are *acta jure imperii*").

56. Brief of Professor Roger O'Keefe as *Amicus Curiae* in Support of Petitioner, *supra* note 48, at 8-9 ("[S]tate immunity from criminal prosecution differs from state immunity from civil jurisdiction in that it is unqualified and subject to no exceptions."); FOX & WEBB, *supra* note 53, at 91.

57. See references in *supra* note 56.

58. FOX & WEBB, *supra* note 53, at 314.

59. Brief for Amici Curiae Republic of Azerbaijan and Islamic Republic of Pakistan in Support of Petitioner at 5, Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264 (2023) (No. 21-1450).

60. State Immunity Act Pt. III § 19(2) (1985) (Singapore) (expressly stating that its provisions do not apply to criminal proceedings); State Immunity Act, R.S.C. 1985, c. S-18, § 18 (Canada); Foreign States Immunities Act 87 of 1981 § 2(3) (South Africa).

61. Statement of Interest of the United States at 30, Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ. 10270).

state immunity law.

1. Immunity for Sovereign Acts

One important case that allows us to reconstruct the principles underlying state immunity for sovereign acts is the ICJ case *Jurisdictional Immunities (Germany v. Italy, Greece Intervening)*. This case illustrates that states are immune from the jurisdiction of other states when they act in their sovereign capacities. Immunity thus creates a firewall that prevents domestic courts of a state from judging another state on the merits, to preserve states' equal standing in relation to one another.

In *Germany v. Italy*, Italian victims of German war crimes brought civil claims against Germany for war crimes committed during World War II, and the Italian Court of Cassation held in favor of Italian courts' jurisdiction. Both sides, as well as the Court, accepted that Germany's war crimes amounted to *acta jure imperii*—indeed, acts of war are quintessentially sovereign acts.[62] This meant that Italy had to prove that under customary international law, there was an exception to sovereign immunity for the kind of war crimes committed by Germany. Based largely on the *jure imperii* determination, the Court rejected Italy's arguments, including an argument that there was an exception to sovereign immunity based on the gravity of the underlying act.[63]

This case demonstrates that principles of state immunity in international law follow a formalistic distinction between procedure and substance. The procedure (state immunity) is not affected by the badness of the underlying act, even when the underlying act is as near-universally condemned as in the case of Germany's war crimes.[64] Immunity determinations are based solely on whether a state was acting in its sovereign capacity. If it was, then the inquiry ends there. This is the case even when—as was the case in *Germany v. Italy*—there was both an *internationally* acknowledged and condemned violation of international law, on the territory of the forum state. In the case of unilateral sanctions where the conduct primarily occurred outside of the territory of the forum state, it is even clearer that the substance of the act cannot affect the determination of immunity.[65]

In sum, *Germany v. Italy* stands for the proposition that international law is extremely reluctant to allow sovereign states to unilaterally judge each other's conduct when they are acting in their sovereign capacities.

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62. Germany v. Italy, *supra* note 50, ¶ 60.

63. *Id.* ¶ 82.

64. *Id.*

65. The fact that even a *jus cogens* violation could not defeat immunity for a state's public, sovereign acts gave rise to understandable concerns about access to justice, particularly for human rights claims. *See* Keitner, *supra* note 51; Shah, *supra* note 55. There are alternative means of balancing access to justice with the principle of sovereign immunity, most of which are outside the scope of this paper. For example, Keitner proposes a stronger emphasis on *individual* responsibility for the wrongful acts carried out in a state's name. *See* Keitner, *supra* note 51, at 179. We also discuss the possibility of multilateral and diplomatic avenues in Part III.

2. The Public-Private Distinction and Criminal Law

That a foreign sovereign is immune from domestic jurisdiction when it is acting in its sovereign capacity is established in the civil context, as demonstrated by *Germany v. Italy*. But how does this rule apply to the criminal context? A growing body of international cases law suggests that sovereign immunity in interstate criminal prosecutions is the general norm[66], not the exception[67] under international law. International instruments also reflect this understanding.[68] Still, many sources that codify the restrictive theory of sovereign immunity seem to sidestep the question of sovereign immunity in the criminal context entirely.[69]

This may have been because states simply did not contemplate criminal cases when they passed laws.[70] It is clear that the restrictive theory of sovereign immunity, and its crown jewel the "commercial activity exception" to sovereign immunity, evolved in response to civil actions such as a suit for a

66. *See* Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 3, 213 (Feb. 14). In considering the validity of an arrest warrant issued by Belgium against a Congolese official for crimes against humanity, the ICJ noted "that which is laid down by international law clearly cannot be displaced by the law of a State" and found that Belgium's prosecution of the official violated international law. However, there is a distinction to be drawn between domestic prosecution of foreign state representatives, and prosecution by *international courts*. In considering if former state officials could be subpoenaed the International Criminal Tribunal for the Former Yugoslavia noted, "it may be the case . . . that, between States, such a functional immunity exists against prosecution for those acts, but it would be incorrect to suggest that such an immunity exists in international criminal courts." Decision on Application for Subpoenas, Prosecutor v. Radislav Krstic (IT-98-33-A), July 1, 2003, ¶ 26. *See also* Jordan Referral re Al-Bashir Appeal (ICC-02/05-01/09 OA2), The Appeals Chamber, May 6, 2019, ¶ 115 ("[T]he absence of a rule of customary international law recognizing Head of State immunity *vis-à-vis* an international court is also explained by the different character of international courts when compared with domestic jurisdictions. While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole.").

67. There are isolated examples of domestic court cases in which immunity is not found to bar criminal prosecution of state actors. However, these cases generally (1) are situated in the context of crimes against humanity in which domestic courts make a finding of universal jurisdiction, and (2) explicitly acknowledge that state sovereign immunity in criminal prosecutions is the baseline norm. *See, e.g.*, Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet, 38 I.L.M. 581 (H.L. 1999) (UK). In this highly controversial decision, the House of Lords determined that Augusto Pinochet could be prosecuted for war crimes he oversaw after the UN Convention Against Torture was enacted. But the court acknowledged foremostly that "[i]n general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries." The *Pinochet* decision was the "first time that a foreign court determined that sovereign immunity was not a bar to criminal prosecution for acts committed by a head of state." Rebecca A. Fleming, *Holding State Sovereigns Accountable for Human Rights Violations: Applying the Act of State Doctrine Consistently with International Law*, 23 MD. J. INT'L L. 187, 187 (1999).

68. *See* G.A. Res. 59/38, at 2 (Dec. 2, 2004); *see also* Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 ("A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."); Int'l Law Comm'n, Rep. on the Work of Its Sixtieth Session, U.N. Doc. A/63/10, ¶ 270 (2008) (affirming that "there was sufficient basis to affirm that the source of immunity of State officials from foreign criminal jurisdiction was . . . first and foremost, international law, particularly customary international law").

69. *See* FOX & WEBB, *supra* note 53, at 313-14 (noting the General Assembly Resolution of 2 December 2004 which states that the Convention "does not cover criminal proceedings").

70. Liu, *supra* note 5, at 297.

breach of contract.[71] However, it is possible that acts taken in a state's private capacity could also be violations of criminal law, such as fraud in a commercial transaction.[72] Therefore, the distinction between a state's sovereign and non-sovereign acts does not map cleanly onto the distinction between civil and criminal adjudication.

If it is difficult to place criminal cases definitively in the category of public or private acts, it is nonetheless possible to engage in conduct-specific analysis to determine whether the conduct in question is closer to a state's public or private act.[73] In this particular case, the violation of sanctions is closer to the kind of sovereign act that waging war is, rather than to the kind of non-sovereign act that is exemplified by the breach of a contract.[74] Erdoğan and high-ranking officials were involved in orchestrating the scheme, using the official powers that they wielded over Halkbank. Even if in general it is possible for private, non-sovereign actors to engage in sanctions evasion, the means by which Halkbank did so implicated its unique position as an instrumentality of the state acting under the direction of sovereign power.

Furthermore, whether the evasion of sanctions by a state instrumentality is a commercial act must be understood in the broader context of contemporary geopolitical conflict. While "the waging of war" evokes images of ground invasion, in the contemporary era such cases of stereotypical conflict are increasingly rare as states wage war by other means. In other words, if the waging of war is the paradigmatic sovereign act, what it means to "wage war" has shifted significantly in the last several decades. Many commentators have argued that sanctions, especially unilateral and secondary sanctions, are now deeply implicated in the projection of states' public power despite their seemingly commercial nature.[75] And a similar argument may be made about the *evasion* of sanctions with the use of public power.

But this analysis does not explain why criminal jurisdiction over foreign states is *categorically* different from civil jurisdiction. We do so in the following Section, where we draw a distinction between civil and criminal jurisdiction based on the position of the sovereign as a potential defendant.

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71. *See* Keitner, *supra* note 51, at 237-38.

72. The most relevant example of this reasoning is the concurrence in *Halkbank*, in which Justices Gorsuch and Alito state that they would have just applied the commercial activity to Halkbank, the criminal nature of the proceedings notwithstanding. *See also In re* Grand Jury Subpoena, 749 F. App'x 1, 3 (D.C. Cir. 2018) (recognizing the possibility of the commercial activity exception to the FSIA applying to criminal proceedings); Adler v. Nigeria, 219 F.3d 869, 875 (9th Cir. 2000) (same).

73. In Section III.B below, we further discuss the possibility of conduct-specific analysis, but in that case as a way of determining whether the instrumentality of a sovereign was acting in its sovereign or non-sovereign capacity. The analysis here is limited to whether a state itself was acting in its sovereign or non-sovereign capacity. Of course, the fact that Halkbank is not the state itself but rather a state-owned enterprise complicates this analysis, which we address in Section III.B.

74. *See generally* Aslı Ü. Bâli & Ntina Tzouvala, *Economic Sanctions: Where Law and Political Economy Meets Third World Approaches to International Law*, YALE J. INT'L L. ONLINE (Sept. 11, 2024), https://www.yjil.yale.edu/economic-sanctions-where-law-and-political-economy-meets-third-world-approaches-to-international-law [https://perma.cc/KA76-MB4Z] (describing how sanctions have been used as a tool of geopolitical contestation and domination).

75. *See id*.

3. Criminal Law and the Heightened Stakes of Moral Condemnation

We have argued so far that a state's sovereign, public acts definitively cannot be subject to the jurisdiction of another state, as illustrated by *Germany v. Italy*, and that *at least in the facts of this specific case*, the state was likely acting in its sovereign capacity. But while a determination of *acta jure imperii* certainly gives rise to immunity, we suggest that the logic by which it does so points to an endorsement of absolute immunity in *all* criminal cases. This is because the distinction between a state's public and private acts is founded on one principle: that states are equal and cannot subject other states to their judgment. And in the exercise of criminal jurisdiction, we argue that the risk of subjecting states to the judgment of another is heightened.

As the leading treatise on state immunity notes, there is a difference in the interests at stake in civil versus criminal cases.[76] In civil cases, the risk of violating the principle of sovereign equality must be weighed against the potential denial of justice to counterparties to transactions with states. In criminal cases, however, the policy considerations that hang in the balance are different. One paradigmatic feature of criminal—as opposed to civil—sanctions is that they involve not just the relation between citizens, as equals under the law, but also the relation between the state and the citizen. As a result, criminal prosecution uniquely involves the moral judgment of the community against the defendant. In the common law tradition, this idea dates back at least as far as Blackstone.[77]

The differences in aim, procedure, and available sanctions and remedies all reflect this difference between criminal and civil sanctions. Two in particular are worth mentioning. First, criminal law seeks to punish rather than merely return an injured party to the *status quo ex ante*. Criminal punishments thus express moral condemnation, based on the shared values of a legal system and society.[78] This means that criminal sanctions may apply even when no particular individual has suffered injury, and sanctions may vary based on the badness of the individual's intent (*mens rea*) in committing the act.[79] By contrast, in civil cases, showing of an actual damage to an individual interest is usually a prerequisite for relief, and the mental element in conduct tends to matter less.[80]

Second, partly as a result of the involvement of the sovereign in criminal law, the available sanctions in criminal law also tend to involve a greater

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76. FOX & WEBB, *supra* note 53, at 91.

77. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1807 n.40 (1992).

78. *Id.* at 1808. Of course, this does depend on the theory of criminal law that one takes; on a purely utilitarian or deterrence-based view, the role of the criminal law is *not* to express moral condemnation. On a deontological or Kantian view, criminal law exists primarily to serve such a moral role. *Id*. (noting that it is difficult to disentangle the idea of punishment as deterrence from punishment as retribution for its own sake).

79. *Id*. at 1805-06.

80. *Id*. at 1805, 1808.

degree of public authority. The "distinctive remedy of the criminal law," after all, "is imprisonment or threat thereof."[81] While not all crimes can give rise to the sanction of imprisonment, the unique association between criminal law and the possibility of imprisonment serves to illustrate the degree to which criminal law deals in *public* sanctions underwritten by the authority of the sovereign.

There are good reasons to be doubtful of a sharp distinction between civil and criminal law.[82] Indeed, in practice the lines are blurred.[83] What matters for our purposes, however, is whether the distinction has meaningful consequences for immunity determinations. And we contend that it does. If the principle of sovereign equality is what is at stake, a state's exercise of *criminal* jurisdiction is, in effect, an assertion that the forum state stands in a sovereign-like relationship to the acts of the defendant state.

B. Status-Based Immunity Versus Conduct-Based Immunity

As discussed thus far, immunity determinations vary depending on how the acts in question are characterized (sovereign versus commercial) and the nature of the proceedings at issue. We have argued that under international law, foreign states should enjoy absolute protection from criminal proceedings. Now we turn to the question, to what extent can this absolute regime be extended to state instrumentalities like Halkbank—a state-owned enterprise (SOE) formally established outside the state structure but operating under significant governmental control? Should an SOE be able to invoke the plea of immunity, and if so, subject to which limitations? This question is intimately connected to the functional reality that the state is an abstract entity that can only act through its organs, agencies, and officials. For the immunity enjoyed by a foreign state to be effective, it must extend to *some degree* to its agents and the acts carried out by them on behalf of their state. The FSIA seems to reflect this understanding with § 1603's broad definition of what constitutes a foreign state, which includes agencies and instrumentalities, defined as "a separate legal person, corporate or otherwise," that is either an "organ" of a foreign state

81. *Id*. at 1809.

82. These reasons include the legal-realist argument that civil punishments also involve the use of force and the ultimate threat of sanction by the sovereign, *see, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); the law-and-economics argument that both civil and criminal law are ultimately aimed at producing socially desirable (i.e. efficient) outcomes; and the development of civil sanctions that increasingly resemble criminal sanctions, which Mann refers to as "punitive civil sanctions." These punitive civil sanctions are especially important because they represent another means through which U.S. courts can exercise jurisdiction over state-owned enterprises and other state instrumentalities. Two examples of such "punitive civil sanctions" are civil penalties under the FCPA and the Racketeer Influenced and Corrupt Organizations Act (RICO). *See generally* Brian Rosner Natalie A. Napierala & Michael D. Sloan, *The Sound of Silence: Criminal Immunity for Foreign Sovereigns Under the FSIA, and Civil RICO Liability for Foreign Sovereigns in the Second Circuit*, N.Y. L.J. (Oct. 3, 2018), https://www.law.com/newyorklawjournal/2018/10/03/the-sound-of-silence-criminal-immunity-for-foreign-sovereigns-under-the-fsia-and-civil-rico-liability-for-foreign-sovereigns-in-the-second-circuit/?slreturn=20240814215634 [https://perma.cc/C5Q9-6YL5] (discussing a circuit split concerning whether the FSIA precludes jurisdiction over foreign sovereigns in civil RICO claims); John D. Corrigan, Note, *Restricting Rico Under FSIA*, 84 ST. JOHN'S L. REV. 1477 (2010) (addressing the intersection of civil RICO claims and the FSIA).

83. *See* Mann, *supra* note 77.

or an entity, the majority of whose "shares or other ownership interest" are owned directly by a foreign state. [84]

In addressing this functional necessity, international law commentary distinguishes between status-based (*ratione personae*) immunities, on the one hand, and conduct-based (*ratione materiae*) immunities, on the other. Status-based immunities, such as those applicable to incumbent heads of state, are absolute and persist throughout the relevant official's tenure.[85] In contrast, conduct-based immunities are temporally more expansive yet narrower in scope, applying solely to particular acts conducted in the exercise of sovereign functions.[86] Thus, while the former attaches to a particular status (defined by ownership or a high-level political-diplomatic role), the latter attaches to particular conduct, irrespective of who exercised it.

The challenge, then, is to determine which of these categories should govern the immunity of state instrumentalities against criminal proceedings. Halkbank, in its defense strategy, arguably invoked both notions. First, there was an attempt to equate Halkbank with Turkey, seeking the same level of immunity that a state enjoys in the criminal context. The brief explicitly states that "for sovereign-immunity purposes, Halkbank is Türkiye"[87] and, in doing that, it relies on the broad definition in the FSIA treating a foreign company like Halkbank as a foreign state when the state owns a majority of its shares.[88] There was also a parallel but distinct strategy to extend immunity to the specific conduct implicated in the prosecution. According to Halkbank's reasoning, the bank's conduct qualified for immunity because it "took the form of the very exercise of the governmental authority delegated to Halkbank," as the exclusively designated entity authorized to hold proceeds owed to Iran. In other words, while the bank may have been a private entity engaged in commercial activities, the specific act in question was beyond what could be undertaken by any private player in the market.

Undoubtedly, embracing the first line of reasoning—equating Halkbank with Turkey—would effectively create a blanket immunity regime, which would shield all SOEs from criminal and regulatory action solely based on their ownership ties to the state. Such a regime would invite corporate misconduct and create a privileged class of rogue actors in international business. One

84. 28 U.S. Code § 1603. Adopting a broader definition of the state compels courts to conduct an immunity inquiry even if the sued entity is not a state in its strict sense. For cases elaborating the rationale of this comprehensive definition, see Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 312-13 (1978) (noting that expansive statutory language matched the underlying statute's comprehensive nature); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138-39 (1990) (explaining that defining a term broadly underscored Congress's intent that the underlying statutory term be expansively applied).

85. *See, e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 22 (Feb. 14) (holding that an incumbent foreign minister is entitled to status-based immunity); Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (governing the immunity of diplomatic agents).

86. Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 18 (2009).

87. Brief for Petitioner at 3, Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264 (2023) (No. 21-1450).

88. *Id.* at 3-6.

scholar calls this possibility as a virtual "free pass" that would hinder U.S. prosecutorial capacities from bringing "much-needed discipline to international finance."[89] However, these deterrence-based considerations must be weighed against the substantial risk of investigating, prosecuting, and punishing SOEs as proxies for their sovereign sponsors, when the acts in question are truly attributable to the latter. This risk is particularly pronounced given the hybrid nature of SOEs and their operations. As Anne van Aaken aptly notes, these corporations operate at a difficult intersection where "the boundaries between state activities and commercial activities become blurred."[90] Some SOEs operate akin to private corporations, with limited political influence in their decision processes and a singular focus on profit-making, while others resemble state ministries subject to continuous governmental involvement and obligated to implement orders from higher-ups.

Given these risks and the varied operational modalities of SOEs, a conduct-based analysis—similar to that advocated in Halkbank's brief—would better align with the overarching functionalist turn in sovereign immunity doctrine. Such an approach would also offer a more targeted protection when the conduct in question possesses a sovereign character. To be sure, determining whether an act is sovereign or non-sovereign necessarily requires thorough judicial analysis, and some degree of tedious line-drawing. Nonetheless, giving concreteness and meaning to such fine distinctions is not unprecedented, neither in U.S. courts,[91] nor in foreign court practice.[92] Domestic courts *can* and *should* refine the law, even if it is permeated by deeper substantive disagreements. In this respect, cases like *Halkbank* present an opportunity to fix these contested boundaries. Moreover, they might even be easy to resolve given that the conduct at issue clearly emanates from the state's higher echelons, with decisive control exercised over the timing, scope, and amount of the illicit transactions.

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89. *See* Paul B. Stephan, *The Supreme Court Takes Up Sovereign Immunity from Criminal Prosecutions*, TRANSNAT'L. LITIG. BLOG (Oct. 6, 2022), https://tlblog.org/the-supreme-court-takes-up-sovereign-immunity-from-criminal-prosecutions [https://perma.cc/8VMM-JUXM].

90. Anne van Aaken, *Blurring Boundaries Between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution*, *in* IMMUNITIES IN THE AGE OF GLOBAL CONSTITUTIONALISM 131, 132 (Anne Peters, Evelyne Lagrange, Stefan Oeter & Christian Tomuschat eds., 2014).

91. Under the FSIA era, an extensive body of case law has developed, gradually refining the application of the commercial activity exception—arguably the most litigated exception of the FSIA—clarifying its initially ambiguous content. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 363 (1993); *see also* Argentina v. Weltover, 504 U.S. 607, 612 (1992) ("[T]he issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in commerce."); Odhiambo v. Republic of Kenya, 764 F.3d 31, 41 (D.C. Cir. 2014) (finding that the exception is not satisfied if "intervening events" occurred between the overseas conduct and the U.S. effect); OBB Personenverkehr AG v. Sachs, 577 U.S. 27 (2015) (finding that for the commerciality exception to apply, the "core of the[] suit" or its "foundation" should have occurred in the United States, not some part of it).

92. For a multi-jurisdictional analysis of different approaches, see Alexander Orakhelashvili, *Jurisdictional Immunity of States and General International Law—Explaining the* Jus Gestionis *v.* Jus Imperii *Divide*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 105 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

III. POLICY IMPLICATIONS OF PROSECUTING SOVEREIGN INSTRUMENTALITIES

We have argued that, in this new era, customary international law at a minimum requires extending state immunity to state instrumentalities based on a conduct-based test, with its precise contours ultimately to be determined by the judiciary. This Part shifts focus back to the Second Circuit on remand and its anticipated course of action, which will likely diverge from customary international law. Going beyond the narrow confines of the law, it will elaborate on the significance and the potential implications of a shift towards SOE prosecutions. Our point is that, in the absence of a tailored immunity regime that accommodates sovereign interests, prosecutions like that of Halkbank risk not only disrupting the balance of powers in the U.S. legal system, but also establishing a new realm of prescriptive jurisdiction, a strategy that other global powers may be inclined to emulate.

The Second Circuit's suggestion that under common law, the executive's determinations of immunity are controlling[93] has been highly controversial in the nascent commentary on the *Halkbank* case.[94] We, too, argue that moving immunity determinations from the judiciary to the executive opens up a new domain of unfettered executive power that risks subjecting foreign actors to hyper-politicized and unpredictable criminal proceedings. The dangers of granting excessive deference to the executive include proscribing judicial inquiry into legally complex jurisdictional determinations,[95] preventing criminal defendants from accessing their rights,[96] and criminalizing foreign relations.[97] All of these risks infuse a degree of arbitrariness into prosecutions that could harm international comity and degrade the credibility of the United States's criminal jurisdiction. Indeed, the *Halkbank* case so far illustrates these very dangers, as President Trump attempted to use his executive influence to change the outcome of the case.[98]

Furthermore, the case has the potential to expand U.S. prescriptive jurisdiction into previously uncharted territory. This is because the *Halkbank* prosecution may represent an attempt to extend the United States's extraterritorial criminal jurisdiction, in part to shore up legitimacy for its increasingly critiqued sanctions regime. This is a risky strategy that may backfire.

Halkbank is a criminal case centered on the violation of a secondary sanctions regime. The primary charge against Halkbank was the bank

93. This is also the U.S. government's position. *See* Brief for the United States at 9, Turkiye Halk Bankasi A.S. v. United States, 16 F.4th 336 (2d Cir. 2021) ("[T]he common law does not recognize such immunity where . . . the Executive determines that immunity is unwarranted.").

94. *See supra* note 8.

95. Koh, *supra* note 7, at 365.

96. *Id.* at 383 ("Executive aggrandizement often [comes] at the expense of a defendant's right to present a defense, demand notice and specificity in criminal statutes, and enjoy consular access.").

97. Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737, 787 (2021).

98. *See supra* Section I.A.

"conspiring to evade U. S. economic sanctions against Iran."[99] Unlike primary sanctions, which restrict a target state's access to the market of the sanctioning state, secondary sanctions restrict sanctioned states from transacting with a third-party target determined by the sanctioning state.[100] On many occasions, and particularly over the last decade, the United States has brought enforcement actions against domestic and foreign actors for secondary sanction-related violations.[101] Some argue that secondary sanctions serve as the "the big arrow" in the Office of Foreign Assets Control (OFAC)'s "quiver of punishments" that enable the "largest extension of [U.S.] jurisdiction."[102]

Still, the *Halkbank* case is distinct in two ways. First, the Justice Department and OFAC traditionally rely on civil enforcement and settlement proceedings when targeting foreign actors for secondary sanction violations, not criminal prosecutions.[103] The criminal targeting of a foreign, state-owned entity like Halkbank on charges of secondary sanctions evasion is virtually unprecedented. In fact, *Halkbank*'s preceding sister case, *United States v. Atilla*[104] was the first time that the United States criminally prosecuted a non-U.S. national for secondary sanctions evasion.[105] In the United States's brief to the Second Circuit, it admitted that immediate criminal prosecution of a foreign actor's sanctions violation was not "OFAC's historical position," but the government still argued that tradition was not dispositive of its current

99. Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264, 264 (2023).

100. Jason Bartlett & Megan Ophel, *Sanctions by the Numbers: U.S. Secondary Sanctions*, CTR. FOR A NEW AM. SEC. (Aug. 26, 2021), https://www.cnas.org/publications/reports/sanctions-by-the-numbers-u-s-secondary-sanctions [https://perma.cc/V93C-Q987].

101. *See Civil Penalties and Enforcement Information*, OFF. OF FOREIGN ASSET CONTROL, https://ofac.treasury.gov/civil-penalties-and-enforcement-information [https://perma.cc/88GY-J25W]; Kevin McCart & Mary Maloney, *U.S. Sanctions Review: A Recap of OFAC's Recent Enforcement Actions (Second Half 2023)*, SQUIRE PATTON BOGGS (Jan. 11, 2024), https://www.globalinvestigations.blog/ofac/u-s-sanctions-review-a-recap-of-ofacs-recent-enforcement-actions-second-half-2023 [https://perma.cc/AEN2-SZMU].

102. Michael Volkov, *The Long Arm of OFAC: Secondary Sanctions, Facilitation, and Causing a Violation*, VOLKOV L. (Apr. 22, 2019) https://blog.volkovlaw.com/2019/04/the-long-arm-of-ofac-secondary-sanctions-facilitation-and-causing-a-violation [https://perma.cc/6G2S-RKV6].

103. *See* Tom Ruys & Cedric Ryngaert*, Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, BRIT. Y.B. INT'L L. 17 (2020) (noting 2014's settlement between French Bank BNP Paribas and the United States as "the largest ever settlement regarding secondary sanctions violations"); *United States Files Complaints to Forfeit More Than $11 Million from Companies That Allegedly Laundered Funds to Benefit Sanctioned North Korean Entities,* U.S. DEP'T OF JUST. (Aug. 22, 2017), https://www.justice.gov/usao-dc/pr/united-states-files-complaints-forfeit-more-11-million-companies-allegedly-laundered [https://perma.cc/3ZEZ-B5Q2] (describing the a complaint filed by the U.S. Attorney's Office requesting a civil money laundering penalty to be levied on a Singaporean and Chinese companies for allegedly laundering US dollars to sanctioned North Korean entities); *New US Efforts to Prosecute Sanctions Evasion and Export Control Violations May Require Compliance Programs to Be Updated,* SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Mar. 16, 2023), https://www.skadden.com/insights/publications/2023/03/new-us-efforts-to-prosecute-sanctions-evasion-and-export-control-violations [https://perma.cc/2DGN-B9CD] ("The U.S. government is putting new emphasis on investigating and prosecuting those who evade sanctions and export control rules . . . .").

104. No. 15 Cr. 867 (RMB), 2018 WL 791348 (S.D.N.Y. Feb. 7, 2018) (finding the former deputy chief executive officer of Halkbank, Hakan Atilla, guilty of fraud and sanctions evasion in connection with the Halkbank activities).

105. *Beware the Reach of U.S. Sanctions*, KOBRE & KIM (Aug. 20, 2018), https://kobrekim.com/insights/client-alert/beware-the-reach-of-us-sanctions [https://perma.cc/S9J7-KEWE].

approach.[106]

Second, adding another layer of complexity to the prosecution, Halkbank is a state-controlled entity. Not only did the United States break new ground by criminally prosecuting sanctions violations by a foreign actor, it also went a step further by targeting an actor that arguably could be considered to be acting in a sovereign capacity. Many framed the Supreme Court *Halkbank* decision as bearing on whether "the United States can prosecute foreign countries and their agencies and instrumentalities in U.S. courts."[107]

Given this context, the *Halkbank* case and the Second Circuit's pending decision may indicate an attempt to extend the United States's criminal jurisdiction and bolster its sanctions regime through a new tool—direct criminal prosecution. Outside of the *Halkbank* adjudication, the United States has made clear an intention to move towards the criminalization of sanctions violations by foreign actors. In a 2023 speech, Deputy Attorney General Lisa Monaco noted that "sanctions are the new FCPA [(Foreign Corrupt Practices Act)]," and that the Justice Department's National Security Division was expanding and restructuring specifically to deal with the "increasing intersection of corporate crime and national security."[108] The unprecedented nature of *Halkbank* suggests the United States is resorting to prosecution to legitimize its secondary sanctions enforcement, at precisely the moment that such enforcement is losing legitimacy in the international community.

Recently, the United States's hegemonic and largely unipolar position in the global financial system has come under threat, as it faces pressure from rising powers like China[109] and Russia[110]. In 2018, after the United States withdrew from the Joint Comprehensive Plan of Action (JCPOA) and reactivated U.S. sanctions against Iran, the EU passed blocking legislation prohibiting individuals from complying with the sanctions.[111]

The *Halkbank* prosecution is even more controversial because of the United States's refusal to utilize alternative avenues to resolve the dispute with Halkbank. In its brief, the United States argued that waiving Halkbank's immunity could lead to SOEs committing crimes with impunity, under the shelter of their sovereign connection.[112] This assertion disregards the existence

106. Brief for the United States at 44, United States v. Atilla, No. 15 Cr. 867 (RMB), 2018 WL 791348 (S.D.N.Y. Feb. 7, 2018), 2018 WL 6445818.

107. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10927, SUPREME COURT CONSIDERS WHETHER THE UNITED STATES CAN PROSECUTE A FOREIGN-STATE-OWNED BANK (Mar. 6, 2023).

108. *Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime*, U.S. DEPT. OF JUST. (Mar. 2, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national [https://perma.cc/S9LQ-2Y48].

109. *China's Mounting Challenge to U.S. Hegemony*, THE INTERCEPT (Apr. 5, 2023) https://theintercept.com/2023/04/05/intercepted-china-us-hegemony [https://perma.cc/3U88-2Q4V].

110. Stephen Fidler, *Russia, China Challenge U.S.-Led World Order*, WALL ST. J. (Feb. 21, 2023), https://www.wsj.com/articles/russia-china-challenge-u-s-led-world-order-3563f41d [https://perma.cc/Z4EA-73TW].

111. Council Regulation (EC) No 2271/96, *as amended by* Commission Delegated Regulation (EU) 2018/1100.

112. Brief for the United States at 32, Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264 (2023) (No. 21-1450).

of other, multilateral international dispute resolution channels to enforce deterrence against criminal acts, such as the U.N. Security Council resolutions or international adjudication under the ICJ or ICC, forums that have been created to deal with exactly these types of disputes. The United States's decision to take internationally unprecedented action through the *Halkbank* prosecution seems to reflect a move to reinforce United States's unilateral financial controls.

The United States should be cautious in setting a harmful precedent that could risk backfiring. As competing imperial powers rise, the United States may be threatened by "mimetic unilateralism"—other, well-positioned economic actors recreating American sanction tactics to pursue their own political interests.[113] This mutual imitation of coercive practices among great power aspirants could lead to major rifts in the international order, as new actors are increasingly able to extend their own coercive economic control over the global financial system.[114] Moreover, disregarding what we have argued are principles of sovereign immunity under customary international law may risk the United States not being able to seek immunity under these same principles when facing prosecution abroad.[115] In a world where the U.S. stronghold on the global economy is challenged, it is imperative that the United States consider the legitimacy and legality of its economic statecraft measures, or risk having its own unilateral strategies turned upon itself.

CONCLUSION

This Essay reconstructed the stakes of *Halkbank v. United States*. In the face of potentially expanding criminal cases against foreign state-owned enterprises, cases such as *Halkbank* are likely to re-emerge. However, existing legal resources such as the FSIA and its surrounding case law have been rendered irrelevant, leaving a void that needs to be addressed. In this task, we proposed turning to customary international law and advocated a conduct-based test, designed to specifically identify sovereign acts of SOEs and shield them from criminal proceedings. Our argument hinges on the premise that SOEs are not private corporations plain and simple. When they act in a sovereign capacity, their prosecutions run the risk of jurisdictional overreach, in a manner that is hard to reconcile with the sovereign equality of states. Without a suitable replacement for the FSIA, such overreaches will be more likely, exacerbating inter-branch conflicts and injecting geopolitical tensions into U.S. courtrooms—vulnerabilities that have already been exposed by the prolonged and complex *Halkbank* saga.

113. Ryan Martínez Mitchell, *Sino-American Sanctions Convergence?*, 7 CARDOZO INT'L & COMPAR. L. REV. 741, 749 (2024).

114. *Id*. at 746.

115. Bill Dodge, *U.S. Brief in* Halkbank *Abandons Customary International Law in Immunity Cases*, TRANSNATIONAL LITIG. BLOG (Dec. 18, 2023), https://tlblog.org/u-s-brief-in-halkbank-abandons-customary-international-law-in-immunity-cases [https://perma.cc/245M-5BTP].